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FEDERAL RULES OF CIVIL PROCEDURE FOR UNITED STATES DISTRICT COURT

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Rule 15 ..... 6, 7

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1950.

No.

TOM GOOD, also known as THOMAS L. GOOD, CARL GOOD, SAMUEL R. GOOD and NORMA E. GOOD, Individually and Trading as GOOD BROTHERS amended to read GOOD BROTHERS, INC.,

Petitioners,

VS.

LENORE CATE, Trustee in Bankruptcy of SPRING GREEN CREAMERY AND CHEESE INDUSTRY, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable Chief Justice and Justices of the Supreme Court of the United States:

TOM GOOD, also known as THOMAS L. GOOD, CARL GOOD, SAMUEL R. GOOD and NORMA E. GOOD, Individually and Trading as GOOD BROTHERS amended to read GOOD BROTHERS, INC. respectfully pray that a Writ of Certiorari issue to review the judgment of the Court of Appeals of the Third Circuit, entered in the above entitled case on April 28, 1950.

OPINIONS BELOW.

The opinion of the Court of Appeals is reported in 182 F. 2d 146. The opinion of the District Court for the Eastern District of Pennsylvania is unreported but appears in the Appendix, pages 334a-344a, inc.

JURISDICTION.

The judgment of the Court of Appeals was entered on April 7, 1950. A petition for rehearing, filed on April 18, 1950, was denied on April 28, 1950 ( ).

The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

QUESTIONS PRESENTED.

1. May judgment based on a claim pleaded, tried and decided by a jury in the trial Court be affirmed on an entirely new and independent claim which is adjudicated for the first time on appeal where:

(a) It is not pleaded in the complaint.

(b) It is not raised as an issue at the trial or submitted to the jury for determination.

(c) Defendant was never given notice of liability on said claim either before or during trial and was thus [illegible]closed from offering evidence in defense ther[illegible]

2. In such case are not the pertinent Rules of Civil Procedure promulgated for the United States District Courts as well as the constitutional guarantees as to due process and trial by jury as provided in the Fifth and Seventh Amendments violated?

STATUTES, RULES OF CIVIL PROCEDURE AND CONSTITUTIONAL AMENDMENTS INVOLVED.

The Federal Rules of Civil Procedure for the United States District Court promulgated pursuant to 28 U. S. C. A. Section 723c are rules 8, 15 and 38. The Constitutional Provisions are the Fifth and Seventh Amendments.

STATEMENT.

Plaintiff filed a civil action founded on book account to recover the price of two separate types of cheese (appendix 334a). The claim was based upon two separate sales made on different dates. As to each of these sales the defenses and issues were entirely distinct (appendix 335a). The defense to the Blue Mild claim was defective quality; as to the Alkmaar claim breach as to date of shipment (appendix 336a).

Upon the issues thus raised by the pleadings and at the trial the Court submitted the case to the jury for special verdict in accordance with Rule 49(a). Ten written interrogatories were submitted to the jury dealing with issues as to quality of merchandise, breach of agreement as to shipment, waiver as to term of shipment, damages and related issues (appendix 326a-328a inc.),

The jury answered the interrogatories in favor of plaintiff and defendant duly filed a motion for a new trial based on trial errors and a motion for judgment N. O. V. as to the Alkmaar claim. Said motions were dismissed by the Court and judgment was entered for $10,545.47.

Defendant duly appealed to the Court of Appeals for the Third Circuit and assigned as errors the refusal of the Court to grant said motion for judgment N. O. V. as to the Alkmaar and for a new trial as to the claim for Blue Mild.

The Court of Appeals in an opinion by Circuit Judge William H. Hastie affirmed the judgment entered below. In so doing the Court decided that liability was predicated on a "contract by which the parties settled the defendant's disputed liability and provided a method of ascertaining its amount" (Opinion of Court page 16, Petition for Rehear-

ing). The Court below further stated "Our conclusion on the issue of compromise makes it unnecessary to consider questions presented and argued concerning the making and breach of the original contract of sale" (Opinion of Court page 17 of Petition for Rehearing).

The pivotal point and the basis for the decision stems from a letter dated January 11, 1947, which was mailed by plaintiff to defendant after the controversy arose between the parties. The merchandise which is the subject of the litigation, was ordered during October and November 1946; upon delivery of the Blue Mild it was found to be in defective condition and defendant promptly notified plaintiff that it was unsalable; the Alkmaar cheese under the agreement was to be shipped by November 2nd, and when plaintiff was unable to produce evidence of shipment defendant cancelled the order on November 6th. Thereafter numerous conversations were held between the interested parties and letters were exchanged concerning the dispute as to liability for the cheese. On January 10th, 1947, Maron, President of the plaintiff corporation, met with defendant for the purpose of adjusting the differences. Maron admitted that no settlement was effected (appendix 36a). Following this meeting he met with his lawyer and prepared a number of "drafts" of a letter which, after being approved by his attorney, was mailed to defendant (appendix 107a, 108a). This letter was objected to as a self-serving declaration under the authority of *A. B. Leach & Co., Inc. vs. Peirson*, 275 U. S. 120, but the objection was overruled by the Court. Significantly, counsel for plaintiff offered the letter "for the fact that it confirms a prior understanding" (appendix 40a).

Said letter of January 11th was used as a spring-board by the Court below for imposing liability upon defendant by construing it to be "an act of primary significance in

the making of a contract" and "as a document embodying an offer" (Opinion of the Court page 17, Petition for Rehearing).

Defendant filed a Petition for Rehearing calling attention to the fact that recovery was predicated upon a claim which was never pleaded or asserted during the trial thereby foreclosing defendant from marshalling or presenting evidence in defense thereto and precluding defendant from having his liability under a new and independent claim decided by the jury, but the Court below denied the Petition without opinion.

SPECIFICATIONS OF ERRORS TO BE URGED.

The Court of Appeals erred:

1. In affirming judgment on a new and distinct claim which was never pleaded, asserted during the trial or submitted to the jury for determination.

2. In transgressing the constitutional guarantees of trial by jury and due process as well as the procedural rights provided for by Rules 8, 15 and 38 of the Rules of Civil Procedure for the District Courts of the United States.

REASONS FOR GRANTING THE WRIT.

1. Clearly the questions presented are of prime importance in the administration of justice. If this decision remains unchallenged and unchanged the Rules of Civil Procedure would be negated and the Constitutional safeguards as to due process and trial by jury would be reduced to impotency.

The gist of the opinion below is to impose liability under a new and different claim of which defendant had no notice or an opportunity to defend. Settlement of this question by this Court is plainly in the public interest because if the Court of Appeals can repudiate the Rules of Civil Procedure and constitutional guarantees no litigant would be safe from arbitrary or unreasonable judicial authority.

The Rules of Civil Procedure have the legal effect of statutory law and, while they are in operation, are binding on the Courts as well as litigants. The constitutional mandate that no property shall be taken without due process of law vouchsafes to a litigant the right to notice as to liability, the right to present evidence and be heard in defense under established procedural standards. The established procedural standards provided by the Rules of Civil Procedure have been ignored and rejected by this startling and revolutionary decision and the circumstances are such as to urgently warrant review and decision by this Court.

2. The decision of the Court below contravenes Rules 8, 15 and 38 of the Rules of Civil Procedure. It is in sharp conflict with the decisions of Federal Courts of other jurisdictions and the Court should review and decide the case to remove the uncertainty which presently exists.

Rule 8 provides that a claim for relief shall consist of "a short and plain statement of the claim showing that the pleader is entitled to relief and a demand for judgment for the relief which he deems himself entitled. Relief in the alternative of several different types may be demanded."

The complaint filed in this action *was for the recovery of* $15,474.40 *"for goods sold and delivered according to the account hereto annexed as Exhibit 'A'."* ( ) .*It was this claim and none other which was pleaded and adjudicated in the trial Court.* The ten interrogatories submitted to the jury for determination were based solely on the issues bearing on the claim "for goods sold and delivered." Manifestly, defendant had no notice whatever that it was being subjected to liability on a different claim based upon a "contract of settlement."

In *Baker vs. Rose,* 8 F. R. D. 193 (D. C. Md.), the Court decided that the function of the Complaint is to afford fair notice to the adversary of the nature and basis of a claim asserted; to the same effect are the cases of *Continental Collieries vs. Shober,* 130 F. 2d 631 (3 Cir.); *Duel vs. National Surety Corporation,* 4 F. R. D. 336.

The decision of the Court below sharply conflicts with the decision of the same Court in *Scott vs. B. & O. R. Co.,* 151 F. 2d 61, where the Court recognized that variance as to cause of action or claim would entitle a defendant to plead surprise so as to enable him to meet the changed issues under the new claim. In *Wall vs. Brim,* 138 F. 2d, 478, the Court of Appeals held that because an issue was presented *which was not submitted to the jury for determination the case should be remanded.* The Court there stated:

> "For the issue, as to whether the defendant in proceeding with the operation as he did after discovering its true character, without advising plaintiff of its

nature and securing her consent to it, committed a trespass upon her or a breach of his obligation to exercise the care and skill required of him, was not developed and tried out as it should have been. The judgment must, therefore, be reversed, and the cause remanded for trial anew with full right to the parties to amend their pleadings and to offer new and additional evidence as they are advised.

Reversed and remanded."

In the instant case when defendant learned for the first time from the opinion of the Court below that liability was predicated upon a claim which was never submitted to the jury, a Petition for Rehearing was filed but it was dismissed by the Court.

In *Moore's Federal Practice*, volume 3, pp. 846, 847; sec. 15.13, the subject under consideration is discussed as follows:

"The purpose of an amendment to conform to proof is to bring the pleadings in line with the actual issues upon which the case was tried; therefore, an amendment after judgment is not permissible which brings in some entirely intrinsic issue or changes of theory on which the case was actually tried, even though there is evidence in the record—introduced as relevant to some other issue—which would support the amendment. This principle is sound since it cannot be fairly said that there is any implied consent to try an issue where the parties do not squarely recognize it as an issue in the trial. * * * The test should be whether the defendant would be prejudiced by the implied amendment, i. e., whether he had a fair opportunity to defend and whether he could offer any additional evidence if the case were to be retried on a different

theory. * * * Where evidence has been admitted over objection and the pleadings have not been amended, no amendment can be implied." * * * (italics supplied).

All of the decisions dealing with this question—with the exception of the one of which we now seek review—hold that a defendant is entitled to fair notice of the claim and a fair opportunity to present his defense and to have his cause determined by a jury. These inalienable rights have been denied to the Petitioner without legal right or reason.

What has been said with respect to the necessity of giving a defendant fair notice of a claim can be said with equal force with respect to his inalienable right secured to him by Rule 38 of Rules of Civil Procedure and the 7th Amendment to the Constitution to have his case decided by a jury. In the instant case, a jury trial was demanded but defendant was foreclosed and thereby effectively denied the right to have its liability on the new and different claim upon which the Court of Appeals affirmed the judgment, decided by the jury, and under these circumstances, Petitioner's legal and constitutional rights were prejudiced.

3. The dire and chaotic situation which would result if this decision should be unchanged is illustrated by the fact that three full days were devoted to the presentation of evidence in the trial Court. This evidence dealt with the issues under the claim "for goods sold and delivered". If the only legal basis for recovery was dependent upon the "contract of settlement" stemming from the letter of January 11th, all of the testimony presented to the jury was irrelevant and, therefore, there was no competent evidence to sustain the judgment entered upon the jury's verdict because the jury never decided that defendant was liable to plaintiff under a claim based on a "contract of settlement."

CONCLUSION.

For the foregoing reasons this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

OSCAR BROWN,
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Attorneys for Petitioner.

FILED
AUG 23 1950
CHARLES ELMORE CRO
CL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 208

TOM GOOD, also known as THOMAS L. GOOD, CARL GOOD, SAMUEL R. GOOD and NORMA E. GOOD, Individually and Trading as GOOD BROTHERS amended to read GOOD BROTHERS, INC.,

Petitioner,

vs.

LENORE CATE, Trustee in Bankruptcy of SPRING GREEN CREAMERY AND CHEESE INDUSTRY, INC.,

Respondent.

REPLY BRIEF SUR PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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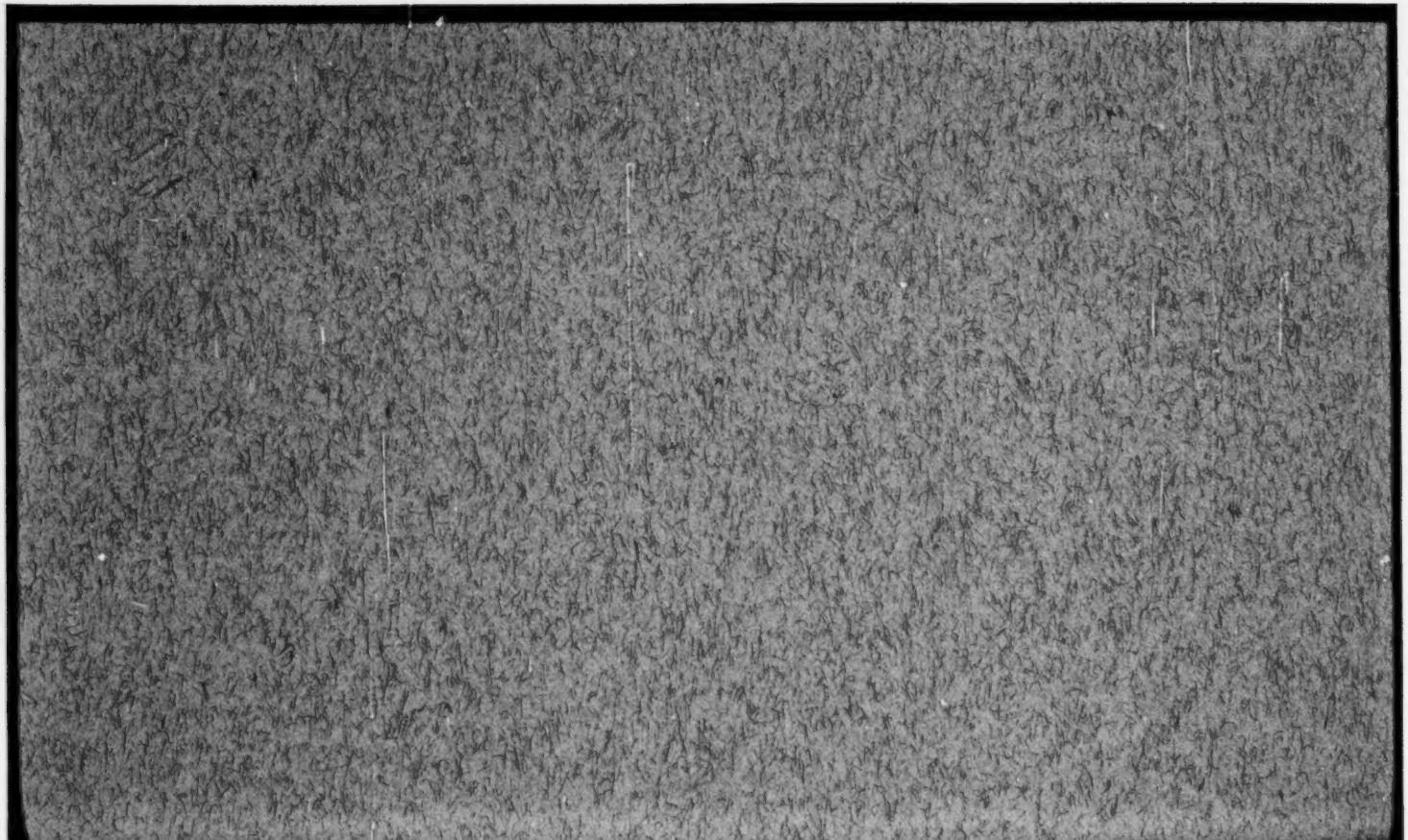

REPLY BRIEF SUR PETITION FOR CERTIORARI.

Respondents admit that the claim under the "contract of settlement," stemming from the letter of January 11, was never pleaded in the Complaint. They argue that it was asserted during the trial because the Court, during a colloquy between Counsel, referred to the letter as a "special contract" (Respondents' Brief, p. 7) and otherwise referred to it under Petitioners' objection on the inadmissibility of the letter as a self-serving declaration.

Such vague "assertions" fall far short of the requirements of the Rules of Civil Procedure and the constitutional mandate as to due process. Petitioners were entitled to *fair notice of the nature of the claim—an opportunity to present evidence in defense thereto—and the right to have the liability thereunder decided by a jury.* There was only one claim pleaded, tried and decided by the jury, and that was the claim for "goods sold and delivered." The ten interrogatories *prepared by the Court* dealt solely with the issues bearing on that claim (Appendix, 335a). The only interrogatory having even remote relationship to the issues stemming from the letter of January 11 is the seventh interrogatory which was as follows (335a):

> "7. At the conference between the parties in Philadelphia on January 10, 1947, did Mr. Maron agree that he would accept the return of the cheese and make no further claim against the defendant in respect of it?"

As to this interrogatory the Court charged the jury that the *burden of proof was upon the Defendant.* The Court stated (319a):

> "The seventh question is an important question. 'At the conference between the parties in Philadelphia on January 10, 1947, did Mr. Maron agree that he would

> accept the return of the cheese and make no further claim against the defendant in respect of it?'
>
> There is an extremely important question. If he did, then of course he has no further claim. *The burden of proof there is on the defendant to satisfy you by the fair weight of the evidence that Maron did agree to surrender his claim, call it all off and take back the cheese.*" (Italics supplied.)

The foregoing proves that the trial Court—at the time—did not regard the claim under the "settlement contract" as being submitted; otherwise it is inconceivable that the Court would have charged that the burden of proof as to that liability was on Defendant.

The only direct reference made by the Court in the charge to the jury on the letter of January 11 appears at pages 320a and 321a. The Court *restricted* the relevance of the letter to the jury as "bearing on the credibility" of witness Gentner. Here again, if that claim was before the Court and Jury for determination, it is inconceivable that it would have been submitted for such restricted consideration.

Finally, the Court instructed Counsel to limit the argument to the jury *solely to the "specific issues"* presented by the interrogatories.

The Court stated (309a):

> "Those are the questions that are going to be asked, and I will ask counsel to confine themselves in argument to those specific issues that are presented, and not to argue the case as though it were a case in which a general verdict was asked."

Assuming—as Respondents now desperately contend—that a claim under the contract of settlement based on the letter of January 11 was "asserted," Petitioners' liability thereunder was never submitted to the jury for determina-

tion, because if it had been, the Court would not have foreclosed Petitioners' Counsel from arguing thereon.

The action of the Courts below—on the questions here presented—are unprecedented and unless reviewed and reversed by this Court will lead to irreparable harm and prejudice to litigants. It will undermine the express provisions of the Rules of Civil Procedure and constitutional mandate as to trial by jury and due process. It will overrule the settled law as to burden of proof and, in the final analysis, will give the trial Courts uncontrolled power to try and decide cases without regard to the law and the rights of litigants to even-handed justice under established procedural standards.

For the reasons stated, the writ of certiorari should be granted.

Respectfully submitted,

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